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10 **IN THE SUPREME COURT**
11 **STATE OF ARIZONA**

12 In the Matter of:

Supreme Court No. R-20-0009

13 **PETITION TO AMEND THE**
14 **RULES OF THE SUPREME**
15 **COURT OF ARIZONA: RULE 24 –**
16 **JURY SELECTION**

17 **COMMENT OF**
18 **THE ARIZONA PROSECUTING**
19 **ATTORNEYS' ADVISORY**
20 **COUNCIL**

21 **I. BACKGROUND OF PETITION**

22 An Arizona chapter of the National Lawyer's Guild ("Guild") has filed a
23 petition to create a new rule of The Supreme Court of Arizona to address what it
24 claims is "subtle and persistent forms of racial and ethnic discrimination" in the use
25 of peremptory challenges in jury selection. In support of its petition, the Guild
claims that discrimination has been permitted to "continue unchecked" by current
procedures in the criminal justice system at large. The petition proposes the
elimination of the *Batson* test and the creation of new procedures on peremptory
challenges.

1 The Arizona Prosecuting Attorneys' Advisory Council ("APAAC") has
2 carefully reviewed and considered the Guild's petition. Without question, racial and
3 ethnic discrimination in jury selection cannot be tolerated in our criminal justice
4 system. However, APAAC opposes this petition. While the underlying basis for the
5 proposal comes from the work of a jury selection workgroup out of the State of
6 Washington (Petition, p. 11),¹ Arizona courts have recently declined an opportunity
7 to follow Washington law in establishing a similar rule. Further, the Guild does not
8 cite to any Arizona case as an example for which discrimination in jury selection
9 was found to exist but was not properly addressed by the *Batson* procedure. Finally,
10 the "objective observer" standard proposed in the petition, the "circumstances" for
11 consideration, and the "presumptively invalid" reasons for peremptory challenges
12 are speculative and provide insufficient objective criteria on which to evaluate the
13 'implicit bias' that the petition is meant to address.

17 II. DISCUSSION/ANALYSIS

18 A. The Proposed Rule is Based on a Washington Law Founded on 19 Washington-Specific Case Law.

20 The Guild's petition "invites this Court to adopt the same rule that Washington
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23 <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221>. (Final Report, "Proposed New GR 37 – Jury Selection
24 Workgroup" ("Final Report")).
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1 promulgated as Washington General Rule 37.” Petition, p. 10. The State of
2 Washington adopted its new general rule (“Rule 37. Jury Selection”) based on work
3 done by a Jury Selection Workgroup in 2018 (Petition, p. 11). That workgroup
4 narrowed its discussion to juror selection jurisprudence in specific Washington
5 caselaw, notably *State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013), and *City*
6 *of Seattle v. Erickson*, 188 Wash.2d 721, 398 P.3d 1124 (2017), which abrogated the
7 *Saintcalle* decision. (“Final Report,” p. 2). In *Erickson*, the Washington Supreme
8 Court expressly stated that it was seizing on an opportunity to “better effectuate the
9 equal protection guaranties espoused in *Batson*.” *Erickson*, ¶ 2. It established a
10 bright-line rule that the peremptory strike by the City of Seattle of the only black
11 juror on a jury panel constituted a prima facie showing of racial discrimination
12 requiring a *Batson* analysis by the trial court. *Erickson*, ¶ 28.

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14 Washington altered the *Batson* framework in *State v. Jefferson*, 192 Wash.2d
15 225, 429 P.3d 467 (2018), decided after the Court adopted Rule 37, in which the
16 Court opined that the current *Batson* test does not sufficiently address racial
17 discrimination in jury selection. The Court replaced the “purposeful discrimination”
18 test of *Batson* with an “objective observer” test that if an objective observer “could
19 view race or ethnicity as a factor in the use of the peremptory challenge,” then the
20 peremptory strike should be denied. *Jefferson*, ¶ 60.

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22 In contrast to the Washington Supreme Court’s adoption of General Rule 37,
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1 the Guild's petition cites *no* Arizona case in support of the adoption of the proposed
2 rule change. Not one Arizona published decision, memorandum decision, or state
3 study is presented expressing the Washington court's belief that *Batson* protections
4 are insufficient in Arizona. On the contrary, in *State v. Escalante-Orozco*, 241 Ariz.
5 254 (2017), *abrogated on other grounds by State v. Escalante*, 245 Ariz. 135 (2018),
6 the Arizona Supreme Court affirmed the *Batson* analysis when finding that the trial
7 court did not err in refusing to deny the use of peremptory strikes. *Escalante-*
8 *Orozco*, ¶¶ 35, 36. And in *State v. Urrea*, 244 Ariz. 443 (2018), the Arizona Supreme
9 Court reviewed the appropriate remedies on a *Batson* violation finding and again
10 affirmed the *Batson* analysis. In neither case did our Supreme Court opine that the
11 current *Batson* test does not sufficiently address racial discrimination in jury
12 selection in Arizona. What was an expressed issue in Washington state, addressed
13 by the adoption of General Rule 37, has not been expressed as an issue in Arizona
14 needing the creation of a new rule of the Supreme Court.

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19 **B. Arizona Has Already Rejected a Request to Follow**
20 **Washington's New Rule on Jury Selection.**

21 As recently as January, 2020, the Arizona Supreme Court declined an
22 opportunity to adopt the very rule the Guild seeks to impose in its petition. In *State*
23 *v. Gentry*, 247 Ariz. 381 (App. 2019), the defendant had argued that the trial court
24 erred in denying his *Batson* challenge to the State's peremptory strike of a racial
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1 minority juror. In affirming the trial court, Division One rejected the Washington
2 procedure and its General Rule 37:

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4 Defendant further asks that we adopt the approach to peremptory
5 challenges established in Washington, which carves out a list of reasons
6 presumed invalid and expands the third step of the *Batson* analysis to
7 include an “objective observer” standard. *See* Wa. R. Gen. G.R. 37(h);
8 *State v. Jefferson*, 192 Wash.2d 225, 429 P.3d 467, 481, ¶ 68 (2018).
9 We are neither bound by Washington state law, nor are we inclined to
ignore well-established Arizona legal precedent. *See State v. Olague*,
240 Ariz. 475, 481, ¶ 23, 381 P.3d 269, 275 (App. 2016) (“Stare decisis
... requires special justification to depart from existing precedent.”).

10 Gentry, ¶ 13. Division One expressly renounced in *Gentry* the very substance of the
11 instant petition.

12 On 01/07/2020, the Arizona Supreme Court denied review in *Gentry*,
13 demonstrating that Arizona courts are not interested in following Washington in
14 finding that *Batson* and its progeny are insufficient to guard against perceived racial
15 or ethnic discrimination in jury selection in Arizona. The Guild has offered no other
16 grounds for its petition.
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19 **C. The “Circumstances Considered” Tests in the Proposed Rule are**
20 **Speculative, Ambiguous, and Ineffective in Identifying Racial or**
21 **Ethnic Bias in Jury Selection.**

22 Finally, even if the Arizona Supreme Court had not recently rejected adopting
23 the Washington “objective observer” standard, the language of the petition’s
24 proposed rule contains “circumstances” for the court to consider which are
25 speculative, ambiguous and particularly meaningless in determining whether race or

1 ethnicity caused unfair exclusion of potential jurors. Considerations such as “the
2 number and types of Questions posed to the prospective juror,” whether
3 “significantly more Questions or different Questions” were posed to the prospective
4 juror compared to others, and whether other prospective jurors “provided similar
5 answers” to the juror but were not subject to a peremptory challenge would be
6 required under the new rule. These considerations promote pure speculation in
7 attributing a particular bias to a party. Do too few questions asked pose a bias but
8 too many questions asked not pose a bias? Must every prospective juror be asked
9 exactly the same question in the same manner and in the same number to avoid any
10 issue of unfair exclusion based on race or ethnicity?

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14 Moreover, the language of the petition’s proposed rule contains
15 “presumptively invalid” reasons for exercising a peremptory strike by a party that
16 are borderline absurd. Some reasons that are presumed invalid by the proposed rule
17 include a prospective juror’s “prior contact with law enforcement officers” and
18 “expressing a distrust of law enforcement.” Contrary to the proscriptions of the
19 proposed rule, prior contact with law enforcement is unrelated to race or ethnicity
20 and should not be presumed an invalid reason for a peremptory strike. *See e.g. State*
21 *v. Mootz*, 808 NW.2d 207, 219 (Iowa, 2012) (“Our cases have repeatedly noted that
22 a juror’s interactions with law enforcement and the legal system are a valid, race-
23 neutral reason for a peremptory challenge.”). Are expressions of support and
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1 appreciation for law enforcement officers equally invalid?

2 Other reasons that can invalidate a peremptory strike (if not corroborated by
3 the judge or opposing counsel) include prospective jurors who are sleeping,
4 inattentive, refusing to make eye contact, exhibiting “problematic” attitude, body
5 language or demeanor, and providing unintelligent and confusing answers to
6 questions. Quite contrary to the proposed rules’ instructions, each of these behaviors
7 may provide *proper* and *valid* justification for a party exercising a peremptory strike
8 not based at all on “implicit, institutional, and unconscious” race and ethnic biases.
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11 The Washington Association of Prosecuting Attorneys, a member of the jury
12 selection workgroup in Washington, correctly acknowledged that “voir dire is a
13 complex and nuanced process” and wrote that “[l]awyers and the trial judge must
14 constantly assess a juror’s language as well as her facial expressions, body language,
15 and tone of voice.” Final Report, p. 6. APAAC agrees with this statement. Arizona
16 should reject an attempt to set forth otherwise valid circumstances and examples for
17 which bias is presumed.
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19 **III. CONCLUSION**

21 The Arizona Prosecuting Attorneys’ Advisory Council recognizes that
22 explicit and implicit bias should not result in racial or ethnic discrimination in jury
23 selection. However, the Guild’s proposal to create a new Rule 24 attempts to impose
24 upon Arizona a law that was tailored for another state, has already been rejected by
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1 Arizona courts, takes away discretion from the parties, and hampers the court and
2 parties in effectively conducting voir dire. The petition should be denied.

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4 RESPECTFULLY SUBMITTED this 1st day of April, 2020.

5 

6 Elizabeth Burton Ortiz, #012838

7 Executive Director

8 Arizona Prosecuting Attorneys'

9 Advisory Council

10 Electronic copy filed with the
11 Clerk of the Arizona Supreme Court
12 this 2nd day of April, 2020.

13 By: 